

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of

ANNIKA K.,

Claimant,

OAH No. N 2006010356

vs.

VALLEY MOUNTAIN REGIONAL  
CENTER,

Service Agency.

**DECISION**

On July 7, 2006, in San Andreas, California, Ralph J. Venturino, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Claimant's parents, Cheryl and Carole, represented the claimant.

Gary Westcott, Ph.D., Clinical Psychologist, represented the Service Agency, Valley Mountain Regional Center (Regional Center).

Evidence was received, the record was closed, and the matter was submitted for decision on July 7, 2006.

**ISSUE**

Is the claimant eligible for Regional Center services under the Lanterman Developmental Disabilities Services Act because she is mentally retarded or has a disabling condition found to be closely related to mental retardation or that requires treatment similar to that required for individuals with mental retardation?

## FACTUAL FINDINGS

### *Claimant*

1. Claimant is a 15-year-old potential service agency consumer who has a substantial disability. The substantial disability can be expected to continue indefinitely.

2. Claimant was born premature (26 weeks gestational age) and had early childhood development impacting complications including bleeding in her brain, apnea episodes, and likely pre-natal alcohol and illicit drug exposure. She was in and out of foster care homes until being placed with her current adoptive parents when she was approximately seven years old.

3. Since at least first grade (approximately 1998), claimant has received services for speech and language impairment.

### *Claimant's Request for Regional Center Services*

4. In May 2005, when claimant was 14 years of age, claimant's parents requested services for claimant from the Regional Center.

5. In December 2005, the Regional Center notified claimant's parent's that the Regional Center denied the request for services because, based upon the information available at that time, claimant did not meet the criteria for mental retardation, cerebral palsy, epilepsy, autism, or the eligibility category that requires a disabling condition found to be closely related to mental retardation ("fifth" eligibility category).

6. On claimant's behalf, her parent's timely appealed the Regional Center's decision denying eligibility, by filing a Fair Hearing Request dated December 22, 2006. They then attended an informal meeting in January 2006. Thereafter, this matter was set for hearing.

7. The focus of the Regional Center's eligibility determination was the criteria for mental retardation and the related "fifth" eligibility category. The issues at the administrative appeal hearing were narrowed to these two eligibility categories.<sup>1</sup>

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<sup>1</sup> At the hearing, claimant's parents attempted to offer evidence concerning an autism spectrum disorder diagnosis that was unavailable to the Regional Center when it made its December 2005 eligibility determination. The Regional Center agreed that this appeal decision would not foreclose eligibility under a relevant category based upon this additional evidence. Claimant may submit a new request for services along with all the additional evidence. A Regional Center denial based upon the additional evidence will be subject to a new Notice of Proposed Action and relevant fair hearing procedures.

### *Historical Psycho-Educational Testing*

8. In or about May 1999, when claimant was approximately eight years old, claimant was administered a Wechsler Intelligence Scale for Children, Third Edition (WISC-III). She earned a verbal IQ score of 57, a performance IQ (PIQ) score of 82 (low average), and a full scale IQ score of 68.<sup>2</sup>

9. In or about March 2000, when claimant was nine years old, claimant was administered a Comprehensive Test of Nonverbal Intelligence (CTONI). She earned an NIQ score of 90, a PIQ score of 87, and a GNIQ score of 94.

10. In or about October 2001, when claimant was ten years old, claimant was administered a Universal Nonverbal Intelligence Test (UNIT) and a Woodcock-Johnson III Tests of Achievement (WJTA III). The results were as follows:

<u>UNIT</u>		<u>WJTA III</u>	
Memory Quotient	77	Basic Reading	70
Reasoning Quotient	82	Reading Comprehension	65
Symbolic Quotient	79	Math Calculation	68
Non-symbolic Quotient	79	Math Reasoning	63
Full Scale Score	76	Oral Expression	72
		Written Expression	69
		Listening Comprehension	72

11. In or about April 2003, an Adaptive Behavior Assessment System (ABAS) was administered. On the ABAS, information was provided by claimant's parent. A General Adaptive Composite (GAC) result of 70 or below is an indication of significant impairment. Claimant achieved a GAC of 45 (deficient).

### *Tuolumne County Special Education Psycho-Educational Testing*

12. In October 2004, Tuolumne County Special Education conducted an assessment of claimant as part of a triennial review. A multidisciplinary team completed the assessment and concomitant report. A Leiter-Revised (Leiter-R) assessment was conducted and resulted in, overall, a low average range ability determination and a composite full scale IQ score of 80 (9th percentile rank).

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<sup>2</sup> There was testimony by claimant's parents that the May 1999 date did not match with the place of assessment (San Benito County) based upon the timing of claimant's foster family placements. However, there was no dispute that an assessment took place at about that time in claimant's life, nor was it proved that the alleged scores were not as indicated.

A WJTA III was administered and yielded measured scores in the “deficient” to “borderline” range as follows:

Basic Reading	77
Reading Comprehension	67
Math Calculation	62
Math Reasoning	64
Oral Expression	75
Written Expression	65
Listening Comprehension	71

A Developmental Test of Visual-Motor Integration (VMI) yielded a low average standard score of 84 (14th percentile rank).

In addition, Vineland Adaptive Behavior Scales (VABS) tests were administered using responses from claimant’s teacher and parents. The Classroom Edition was used with claimant’s teacher and the Survey Edition was used with claimant’s parent’s. The results, which were markedly different, were as follows:

Claimant’s teacher as the respondent:

<b><u>Domain</u></b>	<b><u>Standard Score</u></b>	<b><u>Percentile Rank</u></b>	<b><u>Adaptive Level</u></b>
Communication	70	2	
Daily Living Skills	87	19	
Socialization	78	7	
Adaptive Behavior Composite	75	5	Moderately Low

Claimant’s parents as the respondents:

<b><u>Domain</u></b>	<b><u>Standard Score</u></b>	<b><u>Percentile Rank</u></b>	<b><u>Adaptive Level</u></b>
Communication	51	0.01	
Daily Living Skills	33	0.01	
Socialization	50	0.01	
Adaptive Behavior Composite	41	0.01	Low

The multidisciplinary team concluded that claimant met the criteria for a Specific Learning Disability. There was evidence of a significant discrepancy between cognition and achievement in reading comprehension, math calculation and reasoning, and written expression. There was also a processing deficit indicated in the cognitive ability of conceptualization. However, the cumulative history of claimant’s cognitive assessments was not indicative of consistently deficient levels of cognitive functioning that would warrant claimant being identified as mentally retarded.

*Report of Galyn Savage, Ph.D.*

13. In November 2004 and January 2005, claimant's parents brought her to Galyn Savage, Ph.D., of the Family Health and Wellness Center, for a psycho-educational evaluation. Dr. Savage read the Tuolumne County Special Education multidisciplinary team report and had claimant complete the Wide Range Achievement Test-Revision 3 (WRAT3), WISC-III, and House-Tree-Person test. Dr. Savage acknowledged claimant's premature birth, early childhood abuse issues, and posttraumatic stress and bipolar disorders. Claimant was just shy of 14 years old at this time.

On the WRAT3, claimant obtained a third grade level in reading (3rd percentile) and spelling (4th percentile), and a second grade level in arithmetic (below the 1st percentile).

On the WISC-III, claimant earned a verbal IQ score of 46 (Moderate Mental Retardation Level). A performance IQ score was not reported but Dr. Savage indicated that the verbal and performance IQ scores were so discrepant (much higher nonverbal score) that the full scale IQ score of 57 (Mental Retardation – Mild range of intellectual functioning) would give a false impression and therefore has limited validity.

The WISC-III subtest scores were as follows:

<b><u>Verbal Tests</u></b>	<b><u>Scaled Score</u></b>	<b><u>Percentile Rank</u></b>
Information	1	<0.1
Similarities	1	<0.1
Arithmetic	1	<0.1
Vocabulary	1	<0.1
Comprehension	1	<0.1
Digit Span	2	0.8

<b><u>Performance Tests</u></b>	<b><u>Scaled Score</u></b>	<b><u>Percentile Rank</u></b>
Picture Completion	7	16
Coding	4	2
Picture Arrangement	4	2
Block Design	4	2
Object Assembly	9	46
Symbol Search	4	2
Mazes	4	2

Dr. Savage compared her results to the most recent Tuolumne County results and one component of the circa-1999 WISC-III but did not appear to include claimant's historical results in her final analysis. Her final analysis included a determination that claimant suffers from mild mental retardation based significantly upon Dr. Savage's verbal IQ results (46), the verbal IQ results from the circa-1999 WISC-III (57), and her "limited validity" full scale IQ of 57.

14. What was missing from Dr. Savage's analysis was that the historical results showed a consistent discrepancy between nonverbal (higher) and verbal results (lower) and nonverbal results that contraindicate mental retardation.

*Opinion of Richard G. Gilbert. M.D.*

15. Richard G. Gilbert. M.D., undertook a psychiatric evaluation of claimant on November 9, 2004, and issued a "to whom it may concern" opinion letter dated February 15, 2005. Among other things, he discussed claimant's medication for Bipolar Disorder and "attention problems." He also asserted, without detailing the basis for his assertion, that claimant is mentally retarded and functioning below her grade level. There was no evidence or assertion that he conducted psycho-educational testing. In fact, he referenced that he understood that claimant was "undergoing psycho-educational testing through the school district which may shed some light on her academic struggles." His diagnosis included Bipolar II Disorder, ADHD Combined Type, chronic PTSD (by history), learning disabilities (by history), and Mild Mental Retardation.

*Report of Arnold E. Herrera, Ph.D.*

16. On August 18, 2005, Arnold E. Herrera, Ph.D., evaluated claimant and prepared a psychological evaluation report. The evaluation was based upon the Regional Center's referral and was completed as part of the Regional Center's eligibility determination process. Claimant was age 14 years, 3 months at the time of the assessment. Dr. Herrera administered a number of tests, including the WISC-III, WRAT3, and VABS.

On the WISC-III, claimant performed in and above the "borderline intelligence" range. She earned a verbal IQ score of 69, a performance IQ score of 81, and a full scale IQ score of 73, with subtest scores as follows:

<b><u>Verbal Subtests</u></b>		<b><u>Performance Subtests</u></b>	
Information	3	Picture Completion	9
Similarities	6	Coding	4
Arithmetic	4	Picture Arrangement	6
Vocabulary	5	Block Design	7
Comprehension	4	Object Assembly	9

These results, consistent with the historical results, show the discrepancy between nonverbal (higher) and verbal results (lower). For this reason, similar to Dr. Savage, Dr. Herrera did not put much weight into claimant's full scale score. He relied on the nonverbal results that correlated with previous nonverbal tests. The nonverbal tests contraindicate mental retardation.

The WRAT3 confirmed academic delay. Claimant obtained a third grade level score in reading (high borderline) and arithmetic. The reading score confirmed historical testing and also contraindicated mental retardation.

The VASB showed mixed results with depressed verbal communication skills, borderline socialization skills, and low average daily living skills.

<u>Skills</u>	<u>Standard Score</u>
Communication	69
Socialization	76
Daily Living Skills	81
Adaptive Behavior Composite (ABC)	70

Claimant's parents testified that they witnessed what they believed was coaching by Dr. Herrera during his testing. They also testified that they believed many of claimant's teacher evaluators may have coached or increased certain scores because of claimant's appearance. However, Dr. Herrera's report concluded that there were suspiciously low scores on verbal subtests. Also, while there was no evidence to directly contradict what claimant's parent's believed they saw during their one, short-time observation of Dr. Herrera, the Regional Center's testifying expert, Gary Westcott, Ph.D., has observed Dr. Herrera many times and never witnessed any coaching by Dr. Herrera.

17. Dr. Herrera's results are consistent with more of the historical results than Dr. Savage's and are given more weight in this Decision.

*Testimony of Gary Westcott, Ph.D.*

18. Gary Westcott, Ph.D., a clinical psychologist, testified on behalf of the Regional Center. He is not a medical doctor but testified concerning the Regional Center's eligibility determination process and testified as an expert concerning psycho-educational test results. He offered the basis for Regional Center's decision, including the application of certain statutes and regulations, the definition of mental retardation (DSM-IV), and the analysis of claimant's history of psycho-educational testing.

Dr. Westcott confirmed that at the time the Regional Center made its decision, the Region Center had no evidence suggesting substantially handicapping cerebral palsy, epilepsy, or autism. He also confirmed that claimant does not meet the criteria for mental retardation or the related fifth category. The opinion concerning the mental retardation criteria was based upon, among other things, claimant's nonverbal cognitive abilities,<sup>3</sup> her diagnosed learning disability, and her diagnosed psychiatric disorders. The related fifth category was excluded because a claimant is ineligible if the handicapping condition is due solely to a psychiatric disorder or due solely to learning disability. The Regional Center determined that the claimant was ineligible because her handicapping condition was due solely to a combination of claimant's psychiatric disorders and learning disability.

19. Dr. Westcott's testimony was credible and the evidence presented buttressed the Regional Center's eligibility denial decision.

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<sup>3</sup> Without abundant, competent evidence of coaching, a patient cannot score above their capacity. A patient can score below their capacity depending on environmental and emotional factors, including having a bipolar disorder.

### *Testimony of Claimant's Parents*

20. Claimant's parent's testified in their parental capacity but also testified on their experiences as very knowledgeable people in the areas of special education and caring for special needs children. Among other things, Carole taught special needs children and Cheryl is a licensed speech pathologist working on a thesis involving language acquisition by children with mental retardation.

They correctly understood that claimant was developmentally delayed but believed that she also tested as mentally retarded or was otherwise eligible for Regional Center services based on her disability. Their testimony, while based on more than just a parent's understanding, was outweighed by the evidence of claimant's abilities beyond the mental retardation level and evidence of other diagnoses and issues that could explain claimant's learning issues. This is because the more consistent pattern in the psycho-educational testing showed that clinical mental retardation was not present.

Their questions drew out the distinction between the general use of the term "developmentally delayed" and the legal definition of "developmentally disabled" as it related to eligibility for Regional Center services.

Claimant's parents have the ability to ask the Regional Center for another eligibility determination based upon new evidence, including recent reports of potential autism spectrum disorder.<sup>4</sup>

#### *March 30, 2006 Report of Howard J. Glidden, Ph.D.*

21. Claimant also offered a report dated March 30, 2006, from Howard J. Glidden, Ph.D., a developmental neuropsychologist. Dr. Glidden conducted a neuropsychological evaluation based upon, among other things, his review of medical and other records, and tests he administered to claimant. Many of the tests Dr. Glidden administered were designed for normal adults who sustained brain damage, were normalized on college sophomores, and are not designed to test for mental retardation. In addition, Dr. Glidden's observation and description of claimant's interpersonal communication skills in his "Mental Status" results section contraindicate mental retardation.

22. Dr. Westcott credibly testified that he and the Regional Center reviewed Dr. Glidden's report and that it did not change the decision of ineligibility. The main reasons for the Regional Center's decision were the historical testing results, Dr. Glidden's reported observations, and the kind of tests Dr. Glidden administered.

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<sup>4</sup> Claimant's parents also offered documents related to her early childhood development and discussions of mental retardation based upon her birth circumstances that were not available to the Regional Center at the time of its December 2005 decision. The Regional Center considered these documents before the hearing and the documents did not change its position concerning eligibility. The documents were considered in this Decision.



23. While there are differing opinions among the various doctors, Dr. Glidden's report did not tip the balance in favor of claimant, based upon the whole record.

24. The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) defines mild mental retardation as an IQ level of 50-55 to approximately 70

## LEGAL CONCLUSIONS

### *Applicable Statutes and Regulations*

1. Welfare and Institutions Code section 4512, subdivision (a) states:

(a) "Developmental disability" means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

2. California Code of Regulations, title 17, section 54000, states:

(a) "Developmental Disability" means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric

disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

3. California Code of Regulations, title 17, section 54001, subdivisions (a) and (b), state as follows:

(a) "Substantial disability" means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

4. California Code of Regulations, title 17, section 54002, states as follows:

“Cognitive” as used in this chapter means the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly and to profit from experience.

### *Eligibility*

5. In order to qualify for regional center services, claimant must have a developmental disability. As set forth in section 4512, subdivision (a), “Developmental disability” includes mental retardation, cerebral palsy, epilepsy, and autism; it also includes disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature. California Code of Regulations, title 17, section 54000, subdivisions (c)(1) and (c)(2), state specifically that a handicapping condition that is solely a psychiatric disorder, or solely a learning disability, does not meet the definition of a developmental disability.

6. As discussed in Factual Findings 8 through 23, over the years, claimant was evaluated with varying tests. Although the tests enumerated disparate ranges of test scores, claimant was able to score, multiple times, in ranges that contraindicated a diagnosis of mental retardation. In addition, claimant has been consistently diagnosed as having a learning disability and suffering from psychiatric disorders.

Diagnoses of mental retardation were made without testing or were from test scores that were so low as to be suspect when interpersonal observations from the same test administrators were taken into account. Given claimant’s history of cognitive scores, it is more likely that other factors are depressing claimant’s low scores, such as motivation, focus/concentration, fatigue, stress, and/or emotional difficulties.

7. It was not established by a preponderance of the evidence that claimant is mentally retarded or that she has a disabling condition that is closely related to mental retardation within the meaning of section 4512, subdivision (a). The essential feature of mental retardation, as set forth in the DSM-IV, is “significantly subaverage general intellectual functioning that is accompanied by significant limitation in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.” “Significantly subaverage intellectual functioning” is defined as an IQ of about 70 or below. As previously noted, claimant’s IQ has consistently been above 70 on nonverbal tests, and certain low scores are not indicative of claimant’s underlying cognitive ability.

Claimant’s low-average IQ scores also rule out a determination that claimant has a “closely related” disabling condition. In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, the Court, at p. 1129, stated in part:

The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well.

### *Conclusion*

8. Claimant's case is a complex constellation of issues which have been variously diagnosed as ADHD, specific learning disability, and bipolar disorder, among others. Medication and educational support have all been implemented in an attempt to modulate claimant's impulsivity and improve her adaptive functioning. Learning disabilities and psychiatric disorders do not constitute a developmental disability within the meaning of Welfare and Institutions Code section 4512, subdivision (a), and are in fact specifically excluded from the definition of developmental disability under California Code of Regulations, title 17, section 54000, subdivisions (c)(1) and (c)(2).

9. Claimant has not sustained her burden of proof at this time to establish that she is eligible for Regional Center services under the criteria set forth in applicable laws and regulations.

### ORDER

Claimant Annika K.'s appeal from the Regional Center's denial of services is DENIED. Annika K. is not eligible for services under the Lanterman Act.

### NOTICE

This is the final administrative Decision. Both parties are bound by it; however, either party may appeal this Decision to a court of competent jurisdiction within 90 days.

Dated: July 20, 2006

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RALPH J. VENTURINO  
Administrative Law Judge  
Office of Administrative Hearings